Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 10, 1998

Mr. Ruben D. Campos
Wickliff & Hall
111 Soledad, Suite 2001
San Antonio, Texas 78205-2297

OR98-0667

Dear Mr. Campos:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113369.

The San Antonio Water System (the "system") received an open records request for "[a]ny documents or reports related to a sexual harassment complaint filed against Joe Aceves, former president and chief executive officer of [the system], including information related to the investigation and resolution of the complaint." You have submitted to this office as responsive to the request records relating to two unrelated investigations conducted by the system. You seek to withhold the requested information pursuant to sections 552.101, 552.107(1), and 552.111 of the Government Code.[1]

We initially note that information is not confidential under the Open Records Act simply because the parties involved in the investigations anticipate or request that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within one of the act's exceptions to disclosure, it must be released, notwithstanding any agreement between the system and other parties specifying otherwise.

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[1]You also cite section 552.002(18) as authority for withholding some of the information at issue. None of the subsections found in section 552.002 are considered to be exceptions to public disclosure for purposes of the Open Records Act. The applicable test for required disclosure is twofold: whether the requested information is collected, assembled, or maintained by a governmental body, and, if so, whether the information falls within one of the specific exceptions to disclosure under subchapter C of the Open Records Act. Open Records Decision No. 460 (1987) (construing predecessor statute).

We now address your arguments concerning section 552.101, which excepts from public disclosure "information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision." (Emphasis added.) You contend that the requested records are made confidential under federal law, 42 U.S.C. § 2000e, because some of the requested records relate to a charge of discrimination filed by one of the complainants with the United States Equal Employment Opportunity Commission (the "EEOC"). Although employees of the EEOC are prohibited from releasing any information pertaining to a discrimination complaint unless a complainant files a lawsuit to remedy the discriminatory practice, *see* 42 U.S.C. § 2000e-8(e), this prohibition does not extend to an employer's disclosure of information relating to a claim of employment discrimination. Open Records Decision No. 155 (1977) at 2. Consequently, the requested records held by the system are not confidential under the federal law to which you cite.

Section 552.101 also excepts from public disclosure information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *Ellen*, 840 S.W.2d at 525. However, the court ordered the release of the affidavit of the person under investigation, in part because it ruled that he had waived any privacy interest he may have had in the information by publishing a detailed letter explaining his actions and state of mind at the time of his forced resignation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents.[2] *Id.*

In accordance with *Ellen,* we conclude that with regard to the investigation records contained under Tab 8, all documents pertaining to that investigation must be withheld from the public pursuant to common-law privacy except for the accused's statement and the "summary" of that investigation. After reviewing the documents submitted to this office, we

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[2]The court noted that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance "the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Ellen*, 840 S.W.2d at 525.

conclude that the first document under Tab 8, a memorandum dated October 1, 1996, constitutes an adequate summary of the investigation: it details with reasonable specificity the allegation of sexual harassment, the steps taken during the investigation, and the final resolution of the complaint. The only information contained in this document that must be withheld pursuant to common-law privacy is the name of the complainant.[3]

Similarly, the system must release a "summary" of the other investigation. Unlike the records discussed above, however, there is no one single document among these records that constitutes an adequate summary of the investigation and the final resolution of the complaint. After reviewing the documents submitted to this office, we conclude that the system must withhold all of the records pertaining to this investigation pursuant to common-law privacy except for the following documents:

Tab 4 the transcripts of the statements of the two individuals accused of harassment;

the memorandum dated December 23, 1996 from Kelley Neumann to Michael F. Thuss, which details the investigation;

Tab 6 the "1st Amendment" to the EEOC complaint, which details the allegations; and

the "Full and Final Release" document, which details the final resolution of the complaint.

The only information contained in these four documents that the system must withhold pursuant to common-law privacy are the identities of the complainant and witnesses interviewed during the investigation.

Having resolved the privacy issues raised by your request, we now must address the applicability of the other exceptions you raise to the documents not protected from public disclosure under section 552.101.[4] You contend that the system may withhold these documents pursuant to section 552.107(1) of the Government Code. Section 552.107(1) protects information "that the attorney general or an attorney of a political subdivision is

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[3]There were no "witnesses" to the alleged harassment in this particular investigation. We additionally note that the *Ellen* court did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity or the content of his statement and we decline to extend such protection to the accused individual here. We believe there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace. *See, e.g.*, Open Records Decision Nos. 484 (1987), 400 (1983).

[4]This ruling does not address the applicability of sections 552.107(1) or 552.111 of the Government Code to the documents protected by common-law privacy discussed above.

prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* None of the documents not protected by common-law privacy comports with these standards. Accordingly, the system may not withhold any of these documents pursuant to section 552.107(1).

Finally, we consider whether any of these documents are excepted from public disclosure under section 552.111 of the Government Code. Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 (1993) at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982).

The purpose of section 552.111 is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615 (1993) at 5, this office held that

> to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . . [Emphasis in original.]

Most of the two intra-office memoranda not protected by common-law privacy consist of either factual information or the drafter's opinions concerning a personnel matter not protected by section 552.111, i.e., the investigation of sexual harassment in the workplace. The memorandum dated December 23, 1996, however, contains a "Recommendation" section that consists primarily of the drafter's opinions regarding the system's sexual harassment policy. As such, this portion of the memorandum may properly be withheld from the public pursuant to section 552.111. The system must release to the requestor the remaining portions of this memorandum, as well as all of the remaining documents not protected by common-law privacy.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

June B. Harden
Assistant Attorney General
Open Records Division

JBH/RWP/glg

Ref.: ID# 113369

Enclosures: Marked documents

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